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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Master Docket No. 11-CV-2509 LHK

**DEFENDANTS ADOBE, APPLE,
GOOGLE, INTEL, AND INTUIT'S
OBJECTIONS TO EVIDENCE IN
PLAINTIFFS' REPLY IN SUPPORT OF
SUPPLEMENTAL CLASS
CERTIFICATION MOTION AND
REBUTTAL SUPPLEMENTAL EXPERT
REPORT OF EDWARD E. LEAMER,
PH.D.**

Date: August 8, 2013
Time: 1:30 pm
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

Pursuant to Civil Local Rule 7-3(d), Defendants Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., and Intuit Inc. make the following objections to evidence and arguments presented with Plaintiffs' Reply in Support of Supplemental Class Certification Motion (Dkt. 455) and the Rebuttal Supplemental Expert Report of Edward E. Leamer, Ph.D. (Dkt. 457).

I. Plaintiffs' Deposition Excerpts Mischaracterize Dr. Murphy's and Dr. Shaw's Testimony, and Defendants Should Be Permitted to Supplement the Record

Throughout their reply, Plaintiffs provide misleading and incomplete citations to Dr. Murphy's and Dr. Shaw's depositions. Plaintiffs mischaracterize the question posed or quote just the first word or sentence of the answer, omitting essential context. Defendants object to Plaintiffs' use of this testimony and ask the Court to consider a small number of additional excerpts that provide necessary context, correction and clarification. "[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion," the other party may submit the other parts of the document that provide clarification and context. *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988)); Fed. R. Evid. 106. Defendants have had no other opportunity to submit the following excerpts because the depositions took place after Defendants submitted their opposition brief.

A. Plaintiffs Mischaracterize Dr. Murphy's Testimony

First, Plaintiffs claim Dr. Murphy testified that Defendants' pay structures are not "inconsistent" with classwide proof of impact. Reply at 2. Plaintiffs seriously mischaracterize both the question and his response. Dr. Murphy was asked whether variation in compensation for individuals in the same job is consistent with the idea that *internal equity* has *any effect* on the magnitude of those compensation changes. Shaver Decl. Ex. N at 438:13-17. Dr. Murphy responded he was not saying the two are inconsistent, but that we cannot assume that when one employee's compensation is increased, others' compensation is necessarily increased as well. *Id.* at 438:18-20. As he explained, "necessary and conceivable seem to me to be distinct words." *Id.* at 438:25-439:9. Plaintiffs also quote Dr. Murphy as testifying, "No," that internal equity is not necessarily inconsistent with differentiation of pay. Reply at 8. Plaintiffs misleadingly truncate

1 his response. As he explained, “No. I’m not saying internal equity is -- I’m just saying the more
 2 -- more methods I have to individualize pay, the easier it is to do.” Shaver Decl. Ex. N at 175:13-
 3 15. Dr. Murphy continued that individualization of pay may serve internal equity insofar as
 4 equity is defined “in the sense of paying people based on performance.” *Id.* at 175:16-21.

5 Second, Plaintiffs cite Dr. Murphy’s testimony that averaging aggregate data may be
 6 appropriate in certain circumstances. Reply at 2, 5. But Dr. Murphy was referring to a
 7 hypothetical, not to Dr. Leamer’s use of averaging here. Plaintiffs omit Dr. Murphy’s other
 8 testimony that averaging can also be problematic because it “can induce commonalities that aren’t
 9 there in the individual data.” Shaver Decl. Ex. N at 565:22-23. As Dr. Murphy explained,
 10 whether averaging is appropriate “depends on what you are trying to do ... sometimes averaging
 11 tells a story, sometimes averaging eliminates the story.” *Id.* at 564:9-16.

12 Third, Plaintiffs quote Dr. Murphy’s testimony that weather has some of the same
 13 statistical properties as Defendants’ compensation, which they construe as his admission that
 14 Defendants paid their employees “randomly.” Reply at 3. But they omit Dr. Murphy’s
 15 subsequent explanation that compensation tends to “revert to the mean” due to variable
 16 components such as bonuses and equity grants that are by definition not permanent—which is
 17 distinct from “randomness” like rolling a dice. Attached Brown Decl. Ex. A at 508:11-512:3.

18 Fourth, Plaintiffs cite Dr. Murphy’s acknowledgement that Dr. Leamer included in his
 19 regression variables for firm level success and changes in the general economy. Reply at 9-10.
 20 But Plaintiffs omit Dr. Murphy’s critique that Leamer’s measure of firm level success “doesn’t
 21 perform very well” and “doesn’t explain the variation year to year in firm level compensation,”
 22 while his external variable “works well for some companies, not well for others,” so that clearly
 23 there are “omitted factors he’s not taking account of.” Shaver Decl. Ex. N at 484:10-487:18.

24 Finally, when asked if Professor Manski suggested the reflection problem might be
 25 overcome by studying lagged effects, Plaintiffs quote Dr. Murphy as answering “Yes.” Reply at
 26 10. Dr. Murphy’s full response was, “Yes. *If you didn't have other problems with lagged effects.*
 27 Lagged effects create their own set of problems as I point out...” Shaver Decl. Ex. N at 476:24-
 28 477:6 (emphasis added). Dr. Murphy stated he “wouldn’t consider what Professor Leamer did in

1 this case a solution to that problem.” *Id.* at 478:17-19.

2 **B. Plaintiffs Mischaracterize Dr. Shaw’s Testimony**

3 First, Plaintiffs mischaracterize portions of Dr. Shaw’s deposition to argue that she failed
4 to investigate whether Defendants supervised their managers’ exercise of discretion in setting pay
5 and whether managerial discretion made any difference to pay, and that she never looked at firm
6 pay guidelines. Reply at 3, 12-14. This is not so. Dr. Shaw testified that she reviewed numerous
7 depositions “that described managerial discretion and the guidelines that were given to managers
8 in making pay determinations.” Shaver Decl. Ex. O at 92:19-24, 91:15-19, 186:12-13. Dr. Shaw
9 recognized “[f]irms do provide guidelines in determining pay” and review mechanisms may be
10 used. *Id.* at 91:20-92:5, 94:2-6, 144:23-145:2. Dr. Shaw concluded from the evidence, however,
11 that discretion in setting pay ultimately fell to managers based on their subjective evaluations of
12 employees. *Id.* at 94:15-17 (“in my assessment after reading depositions I found that there was
13 extensive managerial discretion in setting pay”), 98:9-10, 99:11-14, 146:22-25, 147:6-15; Brown
14 Decl. Ex. B at 186:10-188:4 (“managers had ultimate discretion in how they allocate their budget,
15 and could do so to pay some workers very little and some workers a great deal”).

16 Second, Plaintiffs claim Dr. Shaw perceives internal equity the same way they do (Reply
17 at 13), but omit her testimony that “what I found was that people were not adjusted and that the
18 standard pay practices of these Defendant firms is that there would not be adjustment across job
19 titles in response to internal equity.” Brown Decl. Ex. B at 131:10-14. While Plaintiffs claim Dr.
20 Shaw misrepresented an authority cited in her report regarding internal equity (Reply at 13), the
21 full deposition excerpt reveals the opposite and also confirms that her opinions regarding internal
22 equity are based on her expertise and experience. Brown Decl. Ex. B at 77:8-91:7.

23 **II. Plaintiffs’ New Arguments and Analyses Are Not Proper Rebuttal Evidence and**
24 **Should Be Stricken as Untimely**

25 Defendants object to Plaintiffs’ reply and Dr. Leamer’s rebuttal report because they
26 present new arguments regarding (1) a hypothetical “superadditive” effect of cold call “bursts” as
27 a theory for impact on class members; and (2) an analysis of Defendants’ salary data in
28 comparison to salary range targets. Neither is proper rebuttal evidence, and both should be

1 stricken from the reply papers. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir 2007); *see also*
 2 *Johnson v. Sky Chefs, Inc.*, 2012 WL 4483225 at *12 n.10 (N.D. Cal. Sept. 27, 2012).

3 **A. Dr. Leamer’s Conjecture That Cold Call Bursts Have a Superadditive Effect**
 4 **Is Entirely New and Contradicts His Prior Testimony**

5 Unable to explain how an impact to some employees could possibly propagate to impact
 6 all or nearly all class members, Leamer 835:3-836:23, Dr. Leamer offers a new theory in his
 7 rebuttal report: “My opinion is that the information conveyed by each cold call reinforces the
 8 information in other cold calls, making the effects “*superadditive*,” meaning that the effect of a
 9 burst of cold calls is more than the sum of the parts.” Leamer Rebuttal ¶ 3 (emphasis added). Dr.
 10 Leamer has never before claimed that cold calls are “superadditive,” meaning the 100th cold call
 11 would be more valuable than the 99th, which would be more valuable than the 98th, etc. Such a
 12 theory is sheer speculation, nothing in the record or the named plaintiffs’ experience supports it,
 13 and it is contrary to common sense. Dr. Leamer claims in his rebuttal report, “I have never
 14 offered the opinion that the effect of a single isolated call would necessarily increase
 15 compensation for every employee in the Technical Class.” *Id.* ¶ 3. But this is inconsistent with
 16 his previous testimony regarding a single successful cold call in which he affirmed that “an
 17 increase in compensation to a single employee” “[c]ould trigger a higher level of compensation
 18 for all employees.” Leamer 124:7-13. This effect, he previously testified, would spread beyond
 19 Defendants to the entire industry, such as Microsoft employees. *Id.* 147:10-20. The Court should
 20 strike Dr. Leamer’s entirely new “superadditive” theory in his rebuttal report. This is especially
 21 warranted as Plaintiffs represented to the Court that any rebuttal report would be a “true rebuttal
 22 and not introduc[e] brand new theories that should have been raised in the opening.” April 8,
 23 2013 Hrg. Tr. 19:6-10.

24 **B. Plaintiffs’ New Analysis of Salary Ranges Is Untimely and Misleading**

25 Plaintiffs present a new analysis from Dr. Leamer in which he compares Defendants’
 26 actual salary data to their recommended salary ranges and concludes that a certain percentage of
 27 class member employee-years fell somewhere within these ranges. Reply at 3, 14; Leamer
 28 Rebuttal ¶¶ 31, 67, Figs. 6-9. Plaintiffs have had Defendants’ salary data and salary range

1 information for months,¹ and they had every opportunity to present this analysis in their opening
2 papers. On this basis alone, the new analysis is untimely and improper.

3 Plaintiffs also ignore Dr. Shaw's deposition testimony addressing this very scenario and
4 confirming that it would not affect her views. As Dr. Shaw explained, managers had discretion to
5 determine where individual employees would fall within the broad salary ranges based on their
6 skills, talent, expected contributions, and other factors. Shaver Decl. Ex. O at 71:25-72:9; Brown
7 Decl. Ex. B at 189:18-193:8; *see also* Opp. at 18-19 (salary ranges were extremely broad and
8 varied by as much as \$100,000 for some jobs). These ranges pertained to base salary only; bonus
9 and equity were also components of employee compensation and varied substantially. *See* Shaver
10 Decl. Ex. O at 145:17-21. Should the Court consider Plaintiffs' untimely new analysis,
11 Defendants should be permitted to respond in full.

12 **III. Plaintiffs' Declaration from Sheryl Sandberg Is Untimely and Should Be Stricken**

13 Plaintiffs identified Ms. Sandberg as a potential witness and served her with a deposition
14 subpoena in late March, more than a month before filing the current motion. Plaintiffs had ample
15 opportunity to obtain and submit any testimony from Ms. Sandberg with their opening brief.
16 Instead, they waited until their reply to submit her declaration, leaving Defendants with no
17 opportunity to respond. Although Ms. Sandberg's declaration is entirely irrelevant to class
18 certification, it should thus be stricken as improper. *See Contratto v. Ethicon, Inc.*, 227 F.R.D.
19 304, 308 n.5 (N.D. Cal. 2005) (striking witness declaration because "attempt to introduce new
20 evidence in connection with their reply papers is improper").

21 **IV. Conclusion**

22 Defendants' supplemental excerpts from Dr. Murphy's and Dr. Shaw's depositions should
23 be filed and considered in connection with the pending motion. Plaintiffs' new arguments and
24 analyses set forth above and Ms. Sandberg's declaration should be stricken as untimely.

25 Dated: July 19, 2013

By: /s/ George A. Riley
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27 ¹ Dr. Leamer's statement that "Intuit did not produce adequate [salary range] data" is misleading.
28 As Mason Stubblefield testified, "Intuit does not have salary ranges." Cisneros Decl. Ex. II at
130:11-12. Intuit produced any market-based information on salary ranges that it possessed.

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22 **ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in
23 the filing of this document has been obtained from all signatories.